

EX PARTE COPY FILED

**Building The
Wireless Future™****CTIA**

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Randall S. Coleman
Vice President for
Regulatory Policy and Law

November 30, 1995

Mr. William F. Caton
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: Ex Parte Presentation
CC Docket No. 94-54

Dear Mr. Caton:

Today, the Cellular Telecommunications Industry Association ("CTIA"), represented by Messrs. Thomas Wheeler, Brian Fontes, and the undersigned, met with Commissioner Susan Ness and her Senior Legal Advisor, Mr. James Casserly. The discussion concerned economic, jurisdictional and competitive issues with respect to interconnection compensation between local exchange carriers and commercial mobile radio service providers. Copies of the attached documents were distributed to the meeting participants.

Pursuant to Section 1.1206 of the Commission's Rules, an original and one copy of this letter and attachments are being filed with your office. If you have any questions concerning this submission, please contact the undersigned.

Sincerely,

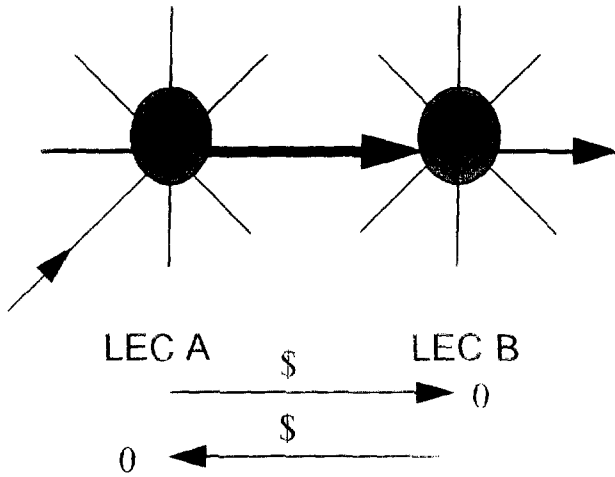
Randall S. Coleman

Attachments

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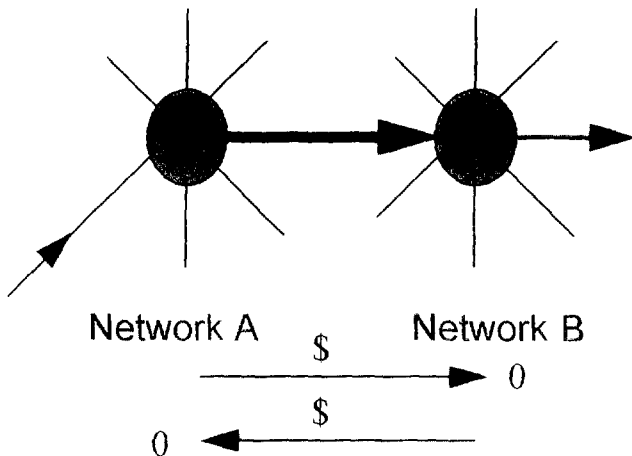
SIMILAR STRUCTURE -- DIFFERENT POLICY

LEC -to - LEC Model



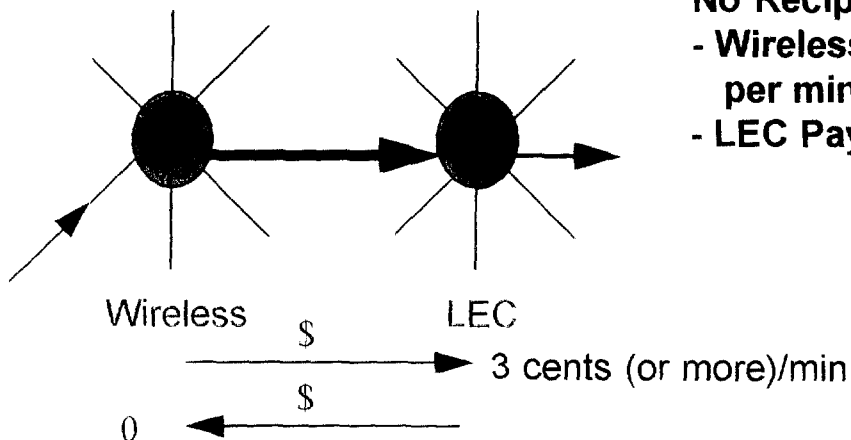
Co-Carrier Status:
Reciprocal Termination By LEC B
of Traffic from LEC A

Internet Model



Network of Networks:
Reciprocal Termination by Network B
of Traffic from Network A

Wireless Model



No Reciprocal Termination:
- Wireless Pays LEC 3 cents (or more)
per minute
- LEC Pays Wireless Nothing



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Wireless Future

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Thomas E. Wheeler
President / CEO

November 20, 1995

The Honorable Reed E. Hundt
Chairman
Federal Communications Commission
1919 M Street, N.W.
Room 814
Washington, D.C. 20554

Dear Mr. Chairman:

The moment has come for Federal telecommunications policy to reflect in practice what it provides in theory relative to the relationship between two-way wireless carriers and local exchange carriers, *to wit*: co-carrier status. There is, simply, no more important issue affecting the delivery of low cost, competitive wireless telecommunications to all Americans.

We urge you to incorporate into CC Docket 94-54, or other appropriate vehicle, the requirement that the financial relationship between local exchange carriers (LECs) and broadband commercial mobile service providers (CMRS) be similar to that which applies between LECs themselves. Such a policy will result in:

- ☐ Increased local competition,
- ☐ Lower wireless fees to consumers,
- ☐ Regulatory parity between competitors, and
- ☐ An expansion of economic opportunity for all telecommunications providers.

These benefits can be realized through a policy of *reciprocal termination* between CMRS providers and LECs. Under such a policy each party receives the revenues for calls which it originates and each terminates the others' calls without charge to the originating carrier -- the same as LEC-to-LEC interconnection compensation today.

The policy of *reciprocal termination* is a proven success -- not only for over 100 years in the LEC world, but also as the economic structure of the Internet. Applying such a policy for CMRS-to-LEC interconnection will stimulate the same kind of success as experienced LEC-to-LEC and with the Internet.

Under *reciprocal termination* there is no complex and costly settlement process -- the originating party keeps the revenue which it generates, even though it may be connecting with another network. In the LEC world, this is referred to as "bill and keep", the phone company which bills the consumer maintains the revenue from each call it interconnects with another carrier. In the Internet world the process works similarly: once you have paid your local network you are capable of interconnecting, without additional fees, to any other network. [Please see the attached diagram].

Increased Local Competition

The Congress is in the process of enacting legislation to increase competition in telecommunications by applying to all providers the "wireless paradigm" enacted in 1993 -- competition in lieu of governmental intervention. The implementation of this policy means that wireless telecommunications is both a competitor to some traditional local loop services and an internally competitive industry, itself.

Such competition cannot be fully realized under the current regulatory reality. The wireless industry cannot compete to provide local service if the typical wireline consumer using 1200 minutes per month (and paying approximately \$25) must pay the LEC \$36.00 just for wireless access charges.

Senator Pressler, in discussing the telecommunications legislation, has referred to the need to eliminate the "hidden subsidies" which prohibit full telecommunications competition. The current structure of CMRS-to-LEC interconnection is such a "hidden subsidy," acting to restrain competition.

Lower Consumer Prices

Today, approximately 10 percent of the cost of an incremental 35 cent minute of wireless usage is payment to the LEC. If wireless prices are to come down, the amount which wireless customers pay to LECs must come down. The implementation of *reciprocal termination* creates such an opportunity.

Professor Gerald W. Brock, in previous submissions to the Commission, has demonstrated that, on average, it costs a LEC two-tenths of one cent (\$.002) per minute to terminate a call. Nevertheless, wireless consumers typically pay LECs three cents per minute (or more) to terminate a call (a margin of 1500%).

Furthermore, the transaction costs to capture and accurately bill terminating calls create an additional burden on the LEC and the wireless consumer which far exceed the cost of providing the interconnection service itself. It is ridiculous that the cost to consumers and the disincentive to competition should be so skewed because of an interconnection practice which, itself, is inconsistent with the Commission's co-carrier policy.

Regulatory Parity

Half of a *reciprocal termination* policy exists in practice today: LECs terminate their calls to the wireless network for no fee. *Reciprocal termination* simply applies that policy to traffic flowing the other way as well.

Competitive telecommunications is rooted in the concept of parity -- if it is a good policy to apply to one competitor, then it is a good policy to apply to all other similarly situated competitors. The goal of both the telecommunications legislation and recent decisions of the Commission has been to eliminate the gaming whereby one competitor uses regulatory policy to gain a competitive advantage against another.

Reciprocal termination is parity, *per se*.

Increase The Economic Pie

The history of telecommunications policy is replete with instances when the incumbent provider, in an attempt to stave off competition, threatens the demise of all that is good and popular -- only to find, in implementation, that the introduction of competition has enabled the economic pie to grow for everyone, including the incumbent.

The same "end of the world" prognostications will, no doubt, greet the concept of *reciprocal termination*. Nevertheless, there can be no doubt that vibrant economic results will accrue to the newly energized and competitive incumbents. It happened with radio and television, it happened with television and cable, it happened with long distance and the old Bell System, it happened with the licensing of two cellular carriers -- and, it is happening with cellular and PCS.

History is unambiguous on this matter: competition means new services and opportunities which, in turn, mean a bigger economic pie for everyone, including the incumbent.

Interstate Wireless Boundaries Mandate Commission Action

The policy of *reciprocal termination* properly comes within the Commission's Federal jurisdiction. The MTA and BTA license areas for PCS (as well as cellular MSA/RSA clusters) are

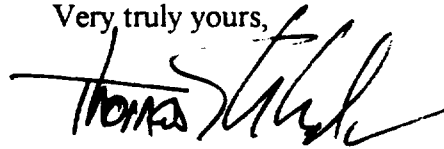
Chairman Hundt
November 20, 1995
Page Four

interstate service areas. As a matter of law, the Commission has authority under sections 332 and 2(b) of the Communications Act to adopt a *reciprocal termination* regulatory plan.

As is illustrated by the Baltimore-Washington market (which stretches from the Delaware border to the outskirts of Richmond), wireless carriers market their services and operate networks without regard to state boundaries -- and consumers benefit as a result. Therefore, the Commission must establish one uniform, national policy regarding interconnection compensation which is consistent with its design of the license areas for interstate service offerings.

Mr. Chairman, at the present time the policy of the Commission is one of co-carrier parity, yet the present practice of the Commission is a *de facto* quarantine which denies wireless carriers the ability to compete in the local loop -- thus punishing wireless consumers. We urge you and your colleagues to exercise the authority you possess to have practice track policy.

Very truly yours,

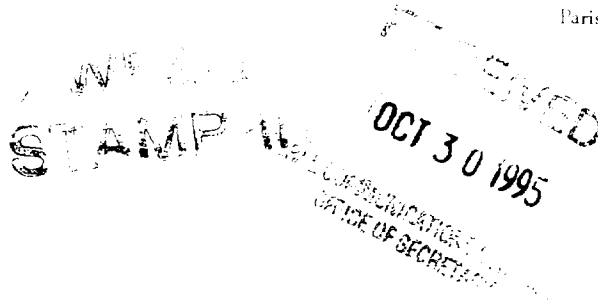
A handwritten signature in black ink, appearing to read "Thomas E. Wheeler", with a stylized flourish at the end.

Thomas E. Wheeler

WILLKIE FARR & GALLAGHER

Washington, DC
New York
London
Paris

October 30, 1995



Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: CC Docket No. 94-54 -- Ex parte presentation

Dear Mr. Caton:

Attached is a document forwarded to Ms. Karen Brinkmann, Special Counsel for Local Competition, which presents our views regarding § 332 of the Communications Act, 47 U.S.C. § 332, and jurisdictional issues. We are submitting two copies of this document for inclusion in the record.

Please feel free to call if you have any questions.

Sincerely,

Jennifer A. Donaldson

enclosure

cc: Karen Brinkmann

WILLKIE FARR & GALLAGHER

Washington, D.C.
New York
London
Paris

October 27, 1995

Ms. Karen Brinkmann
Special Counsel for Local Competition
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W., Room 518
Washington, D.C. 20554

Re: Section 332 and jurisdictional issues

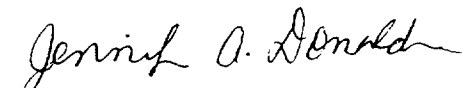
Dear Karen:

This responds to your request for information regarding the scope of Section 332's preemptive language as it impacts interconnection compensation issues arising between LECs and CMRS providers.

As we have previously noted, we believe that Section 332 provides the Commission with the authority, and arguably the obligation, to preempt state regulation of LEC to CMRS interconnection compensation rates in favor of a uniform, federal policy. Moreover, we believe that the historical record reflects the need for limited Commission intervention regarding LEC to CMRS interconnection compensation to ensure that LECs are unable to exercise their substantial, persistent market power to the detriment of CMRS competition. Our analysis of these issues is outlined in the attached document.

Please feel free to call if you have any questions or need additional information.

Sincerely,



Philip L. Verveer
Jennifer A. Donaldson

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THE BASICS OF INTERCONNECTION COMPENSATION PREEMPTION

COMMISSION'S TREATMENT OF INTERCONNECTION COMPENSATION ISSUES

In the Commission's analysis of LEC to CMRS interconnection issues, it addressed in general terms the application of its LEC to cellular interconnection policies to govern LEC to CMRS relationships.¹ When considering whether to preempt state regulation of LEC to CMRS interconnection rates, the Commission, in reliance upon its 1987 analysis of LEC to cellular interconnection issues,² chose to refrain from federal preemption of state regulation of such rates "at this time."³ Apparently, as a policy matter, the Commission viewed the rates charged for interconnection as "segregable."⁴ The Commission instead proposed an interstate mutual compensation scheme for the termination of LEC/CMRS traffic coupled with a decision to explore the efficacy of requiring LECs to tariff all interconnection rates.⁵

¹ See Regulatory Treatment of Mobile Services, Second Report and Order in GN Docket 93-252, 9 FCC Rcd 1411, at 1497-1501 (1994) ("CMRS Second Report"); see also Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services, Notice of Proposed Rule Making and Notice of Inquiry in CC Docket 94-54, 9 FCC Rcd 5408, at 5450-5453 (1994) ("CMRS Interconnection Rule Making").

² See CMRS Second Report at 1498 (citing The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, Declaratory Ruling, 2 FCC Rcd 2910, 2912 (1987)).

³ CMRS Second Report at 1498.

⁴ Id.; see also CMRS Interconnection Rule Making at 5467-5469. It appears that the Commission, by its conclusion, was only loosely following the post-Louisiana approach to interpreting and applying Section 2(b), 47 U.S.C. § 152(b). It appears that it did not separately analyze the express preemptive statements by Congress in Section 332, 47 U.S.C. § 332.

⁵ Id. at 1498-1499. The Commission solicited comment regarding the need for LEC tariff obligations in its CMRS Interconnection Rule Making, see 9 FCC Rcd at 5450-5457.

More recently, the Commission has affirmed its decision not to interfere with state regulation of LEC to CMRS interconnection rates. See Petition on Behalf of the Louisiana Public Service Commission for Authority to Retain Existing Jurisdiction Over Commercial Mobile Radio Services Offered Within the State of Louisiana, Report and Order in PR Docket 94-107, 10 FCC Rcd 7898, (continued...)

Importantly, for these purposes, and as a policy matter, in considering whether CMRS providers should have direct interconnection obligations, the Commission concluded that the statutory language within Section 332 clearly "preempts state regulation of interconnection rates of CMRS providers."⁵ Importantly, the Commission, in reaching this conclusion, recognized that the rates charged by CMRS providers comprehended charges to co-carriers (i.e., other CMRS providers) as well as end-user (i.e., customer) charges. That same authority controls in this case, and with the same preemptive result.

In light of Section 332's express preemptive mandate, and the Commission's statutory charge to secure competition and efficiency in the CMRS market, the Commission should adopt a comprehensive interconnection compensation rule.⁷ Given the Commission's recognition that "commercial mobile radio service interconnection with the public switched network will be an essential component in the successful establishment and growth of CMRS offerings,"⁸ as a matter of policy, it is the correct decision.

The record developed in response to the Commission's inquiries demonstrates that limited Commission intervention in this area is warranted. In submissions received during the pleading cycle leading to the CMRS Second Report, including the subsequent reconsideration phase, as well as the comments received in response to the Commission's CMRS Interconnection Rule Making, commenters chronicled the need for Commission intervention to ensure that LECs did not unfairly exercise their market and bargaining power to the detriment of competition.

⁵(...continued)

7908 (1995) ("we note that Louisiana's regulation of the interconnection rates [charged] by landline telephone companies to CMRS providers appears to involve rate regulation only of the landline companies, not the CMRS providers, and thus does not appear to be circumscribed in any way by Section 332(c)(3)").

⁶ Id. at 1500 (citing 47 U.S.C. § 332(c)(3)).

⁷ Such action would be entirely in keeping with the Commission's explicit recognition of the utility of preemptive action: "the charge for the intrastate component of interconnection [at times] may be so high as to effectively preclude interconnection. This would negate the federal decision to permit interconnection, thus potentially warranting our preemption of some aspects of particular intrastate charges." Id. at 1497. (citation omitted).

⁸ CMRS Second Report at 1499.

Moreover, several commenters opined to a limited extent regarding the Commission's preemptive authority under § 332.

Notably, commenters favoring a tariff filing requirement in the Commission's CMRS interconnection Rule Making, including Cox, Comcast, the California Public Utilities Commission, GSA and MCI, did so because of their belief that tariff filing requirements were necessary to curb LEC discriminatory conduct. Moreover, it appears that the majority of commenters opposing a tariffing requirement did so more in response to their perception of the burdens associated with tariffing rules, and not necessarily because they perceived that the market was functioning properly. Of special import, Cox and Comcast, in their various submissions to the Commission, referenced studies conducted by Professor Gerald Brock.⁹ The Brock studies describe in some detail the problems surrounding interconnection compensation issues. As the Brock studies make clear, pricing compensation for termination services is not a mobile services-specific problem, but rather one endemic to the entire telecommunications industry.

Regarding preemption, in both the CMRS Second Report proceeding and the CMRS Interconnection Rule Making, preemption issues were not generally the focal points of commenter analysis. Those commenters addressing this issue tended to follow industry lines, *i.e.*, mobile services providers favored Commission preemption while state regulatory authorities and LECs generally opposed preemption. Based upon a cursory review, it appears that an in-depth analysis of this issue was not conducted, and that the record to date requires supplementary analysis.

In sum, while the Commission has yet to adopt or propose a comprehensive, federal plan to govern LEC to CMRS interconnection compensation, the record supports Commission action in this regard. The following sections detail the Commission's preemptive authority (and obligations) under the Communications Act.

THE BASICS OF PREEMPTION

The Supremacy Clause of the U.S. Constitution empowers Congress to preempt state and local law.¹⁰ Preemption by federal statute can occur in several ways, including: (1) by a clear expression of intent to preempt; and (2) where compliance with

⁹ See Gerald W. Brock, The Economics of Interconnection (April 1995).

¹⁰ Congress, in turn, may confer its power upon federal agencies.

both state and federal law is impossible.¹¹ The common carrier provisions of Title II of the Act generally reflect a dual regulatory scheme with respect to telecommunications services, i.e., the Commission retains jurisdiction over interstate matters while intrastate regulation resides with the states.¹² However, with respect to mobile services, state jurisdiction is explicitly limited by Section 332.¹³

SECTION 332 ANALYSIS

SECTION 332(a) POLICY GOALS

In revising Section 332, Congress intended to promote a uniformly-regulated, efficient, competitive CMRS market. For this reason, Congress charged the Commission with implementing regulatory policies which foster the full development of the CMRS market. Congress envisioned that this process may well evolve to CMRS providers acting as competitors to the local loop.¹⁴

¹¹ See Louisiana Public Service Commission v. FCC , 476 U.S. 355, 368-369 (1986) ("Louisiana").

¹² Specifically, section 1, 47 U.S.C. § 151, grants the Commission jurisdiction over interstate telecommunications matters. The Communications Act specifically reserves to the states "jurisdiction with respect to . . . charges, classifications, practices, services, facilities [and] regulations for or in connection with intrastate communication service." 47 U.S.C. § 152(b).

¹³ Section 332 effects a dramatic change upon the Section 2(b) jurisprudence with its explicit preemption of state regulation over CMRS rates and entry. The Commission also possesses authority to preempt state regulation to encourage and facilitate the further build-out of a competitive, efficient interstate telecommunications services infrastructure. As discussed below, this retention of authority by the Commission under Section 2(b) of the Act, 47 U.S.C. § 152(b), also serves as a basis, albeit more limited, to preempt state regulation of LEC to CMRS interconnection compensation rates.

¹⁴ Section 332 contains examples of Congress' recognition of and providing for competitive entry by CMRS carriers into the local exchange market. See, e.g., 47 U.S.C. § 332(c)(3)(A) ("Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal

(continued...)

Under Section 332(a), the Commission, in managing CMRS spectrum, is obligated to reduce regulatory burdens on spectrum users, improve efficient spectrum use and overall efficiency, increase interservice sharing opportunities between CMRS providers and other services (i.e., encourage maximum utilization of spectrum), encourage competition and ensure the safety of life and property. Specifically, Section 332(a) provides that the Commission, in managing mobile services, consider consistent with § 1 of the Act¹⁵ a number of policy objectives including whether its actions will:

- (1) promote the safety of life and property;

¹⁴(...continued)
availability of telecommunications service at affordable rates.") As the legislative history clarifies, see H.R. Conf. Rep. No. 213, 103rd Cong., 1st Sess. 493 (1993), "the Conferees intend that the Commission should permit States to regulate radio service provided for basic telephone service if subscribers have no alternative means of obtaining basic telephone service. If, however, several companies offer radio service as a means of providing basic telephone service in competition with each other, such that consumers can choose among alternative providers of this service, it is not the intention of the conferees that States should be permitted to regulate these competitive services simply because they employ radio as a transmission means." ("Conference Report").

In addition to revealing Congress' vision regarding the competitive evolution of CMRS, these statements serve as well to illustrate Congress' intent that CMRS providers be subject to minimal state regulation. That is, when CMRS providers are the sole service providers (and therefore act as a substitute to the LEC), Congress limited state regulation of these CMRS providers solely to universal service concerns and no more. Compare Petition of Arizona Corporation Commission, to Extend State Authority Over Rate and Entry Regulation of All Commercial Mobile Radio Services, Report and Order and Order on Reconsideration in PR Docket 94-104 and GN Docket 93-252, 10 FCC Rcd 7824, 7834, 7838-7839 (1995) (FCC rejected Arizona Commission's attempts to retain CMRS rate regulation based upon universal service concerns; FCC noted that Arizona failed to meet the statutory criteria for such regulation.)

¹⁵ 47 U.S.C. § 151. Among other things, § 1 of the Act admonishes the Commission "to make available, so far as possible, to all the people of the United States a rapid, efficient, nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges." Id. (emphasis added).

(2) improve the efficiency of spectrum use and reduce the regulatory burden upon spectrum users, based upon sound engineering principles, user operational requirements, and marketplace demands;

(3) encourage competition and provide services to the largest feasible number of users; or

(4) increase interservice sharing opportunities between . . . mobile services and other services.¹⁶

The policy goals of Section 332(a), read in conjunction with Congress' regulatory forbearance mandate both at the state and federal level discussed below, render it appropriate for the Commission to preempt inconsistent intrastate interconnection compensation arrangements.

SECTION 332(c) PREEMPTION PROVISIONS

By its terms, Section 332 provides a clear statement by Congress that all similar CMRS services should be subject to the same treatment, but not be treated like traditional common carriers, e.g., the LEC. Because of the presence of CMRS competition and the promise of its continued growth and development, Congress permitted the Commission to forbear from burdensome Title II requirements with respect to CMRS.¹⁷ Moreover, in recognition of the interstate nature of mobile services and the federal interest in fostering nationwide, seamless wireless networks as part of the NII, it preempted state regulation of CMRS rates and entry.¹⁸

¹⁶ See 47 U.S.C. § 332(a)(1)-(a)(4) (emphasis added). While this subsection is framed with reference solely to "private mobile services," the determinations required to be made by the Commission necessarily include consideration of all mobile services including CMRS. As the House and Conference Reports are silent on this point, one can logically infer that the retention of the word "private" in the 1993 amendments to Section 332(a) was due to inadvertence.

¹⁷ See 47 U.S.C. § 332(c)(1)(A). The principles underlying Title II common carrier regulation were intended for the monopoly communications provider -- regulation was designed to achieve market outcomes approximating those that occur within a competitive milieu.

¹⁸ See 47 U.S.C. § 332(c)(3)(A). See also H.R. Rep. No. 111, 103rd Cong., 1st Sess. 260 (1993) ("To foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national (continued...)

This preemptive action on the part of Congress fundamentally and permanently altered the role of state and local governments in regulating CMRS. It necessarily impacts state regulation of LEC to CMRS intrastate interconnection rates. Specifically, § 332(c)(3)(A) provides in relevant part:

Notwithstanding sections 2(b) and 221(b), no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service . . . except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.

Thus, the statute provides that states have no authority over rates charged by CMRS providers, nor can states regulate CMRS entry.

By its very nature, this prohibition against state action comprehends intrastate interconnection compensation charges negotiated between LECs and CMRS carriers. The rates charged by CMRS providers for completing LEC traffic are rates charged by a CMRS provider. Moreover, the explicit and absolute prohibition against entry regulation comprehends state regulation of LEC interconnection rates as well. That is, any entry barriers, whether entirely or merely partially effective, whether direct or indirect, are prohibited. Therefore, states may not directly or indirectly impede entry, either entirely or partially (e.g., through added cost or delay) by their regulation of LEC to CMRS interconnection compensation rates.¹⁹

Further, the notion that states do not have "any authority" under Section 332 over rates strongly suggests that states should not be permitted to indirectly affect LEC to CMRS interconnection rates through their lawful exercise of authority over the "terms

¹⁸(...continued)
telecommunications infrastructure, new section 332(c)(3)(A) also would preempt state rate and entry regulation of all commercial mobile services.") ("House Report").

¹⁹ Congress' action to preempt entry regulation for mobile services represents a fundamental shift in policy from Section 2(b) of the Act, 47 U.S.C. § 152(b), so that to take the most stringent possible view of Section 2(b), states no longer "retain jurisdiction over purely intrastate calls notwithstanding the economic effect such State jurisdiction might have on the interstate market." See Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC, 746 F.2d 1492, 1500 (D.C. Cir. 1984) (Bork, J.).

and conditions."²⁰ The legislative history supports this analysis. Specifically, the House Report's discussion of "terms and conditions" refers, among other things, to consumer protection measures such as "customer billing information and practices and billing disputes";²¹ importantly, there is no mention of any terms or conditions that limit or modify the complete preemption of carriers' rates.

And viewed from a broader perspective, the legislative history also supports this construction of Section 332. Both the House and Conference reports detail Congress' intention to create a national policy for wireless services designed to minimize intrusive federal and state regulation.²² Such a policy is predicated, in part, upon regulatory parity and uniformity notions, i.e., neither federal nor state nor local governments, by their regulatory efforts, are entitled to adopt regulations which introduce disparity among similar services. It also is predicated upon Congress' desire to promote competition, new technologies and the rapid buildout of a national wireless communications infrastructure.

In revising Section 332, Congress sought to ensure regulatory parity among CMRS providers because "the disparities in the current regulatory scheme [e.g., private mobile carriers are exempted from state and federal regulation of rates and entry while common carrier mobile services are not] could impede the continued growth and development of commercial mobile services."²³ In addition, it intended that all CMRS providers be

²⁰ As explicated in the House Report at 261, "other terms and conditions" is meant to include "matters generally understood to fall under 'terms and conditions.'" As Section 2(b) reserves with the states jurisdiction over intrastate telecommunications matters, including intrastate terms and conditions, any limitations on state and local jurisdiction arising under a traditional Section 2(b) analysis would equally apply with respect to state and local regulation of mobile services "other terms and conditions" under Section 332.

²¹ House Report at 261.

²² Moreover, in at least one instance, the floor debates allude to the need for only minimal state regulation. See 139 Cong. Rec. H3287 (daily ed. May 27, 1993) (statement of Rep. Markey).

²³ See House Report at 260. See also Conference Report at 494 ("in considering the scope, duration or limitation of any State regulation [the Commission] shall ensure that such regulation is consistent with the overall intent of this

(continued...)

subject to "[u]niform rules . . . to ensure that all carriers providing such services are treated as common carriers" under Title II of the Act.²⁴ By permitting regulatory forbearance of Title II provisions, Congress intended "to establish a Federal regulatory framework to govern the offering of all commercial mobile services."²⁵

Congress also specifically found it necessary to "preempt state rate and entry regulation" of CMRS providers to "foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure."²⁶

As these statements show beyond dispute, Congress intended that the mobile services marketplace function efficiently, competitively, and with a minimum of regulatory intervention. Regulatory intervention, whether federal or state, would not be tolerated if it introduces disparate treatment of similar services. By amending Section 332, Congress ensured that neither local nor federal government could harm CMRS competition or impair the continued build out of our nation's wireless communications infrastructure. State and local governments may not lawfully bar entry, create regulatory disparities or introduce significant inefficiencies in the production of CMRS

²³(...continued)
subsection as implemented by the Commission, so that, consistent with the public interest, similar services are accorded similar regulatory treatment.") (emphasis added).

²⁴ House Report at 259.

²⁵ See Conference Report at 490. See also 139 Cong. Rec. S7996-S7997 (daily ed. June 24, 1993). Congress incorporated by reference the findings of both the House bill and the Senate version. Section 402(13) of the Senate version finds that "because commercial mobile services require a Federal license and the Federal Government is attempting to promote competition for such services, and because providers of such services do not exercise market power vis-a-vis telephone exchange service carriers and State regulation can be a barrier to the development of competition in this market, uniform national policy is necessary and in the public interest." (emphasis added).

²⁶ House Report at 260. Moreover, while § 332 permits states to petition under certain circumstances to re-regulate CMRS provider rates, Congress intended that the Commission, when considering such petitions, should "give the policies embodie[d] in Section 332(c) an adequate opportunity to yield the benefits of increased competition and subscriber choice." Id. at 261.

through their regulation of LEC to CMRS interconnection compensation rates.

SECTION 2(b) ANALYSIS

Section 2(b) of the Act²⁷ provides an alternative basis for Commission preemption in this area. While the case law interpreting the Commission's preemptive authority under Section 2(b) is rather amorphous, it does recognize an "impossibility" rationale which permits the Commission to preempt state regulations which essentially negate legitimately exercised federal authority.

In this case, the Commission is justified in preempting inconsistent LEC to CMRS interconnection compensation rates to ensure the efficient, competitive buildout of nationwide wireless communications infrastructure. Any state interconnection compensation regulatory policy contrary to the Commission's comprehensive rule would essentially negate the fulfillment of this legitimate federal policy, and therefore is subject to preemption.

Louisiana Public Service Commission v. FCC,²⁸ recognizes that in certain situations it would not be possible to separate interstate and intrastate components, and where that is so, federal preemption would be warranted. It thus cites with approval previous cases which relied upon the impossibility of separating interstate from intrastate components in concluding that preemption was warranted.²⁹

Consistent with Louisiana, the lower courts have continued to recognize an exception to section 2(b), permitting Commission preemption when the states' exercise of authority unavoidably would negate the legitimate exercise of the Commission's own interstate authority. These cases variously recite that a demonstration of physical impossibility of separating interstate and intrastate components is required to allow federal

²⁷ 47 U.S.C. § 152(b).

²⁸ 476 U.S. 355 (1986).

²⁹ Id. at 375, note 4 (citing North Carolina Util. Comm'n v. FCC, 537 F.2d 787 (4th Cir. 1976), cert. denied, 429 U.S. 1027 (1976); North Carolina Util. Comm'n v. FCC, 552 F.2d 1036 (4th Cir. 1976), cert. denied, 434 U.S. 874 (1977) (FCC was within its authority to allow subscribers to provide their own telephones and to preempt state regulation which prohibited connection of such phones under impossibility theory)).

preemption,³⁰ while still approving in some cases a showing of economic indivisibility.³¹ Moreover, several opinions have sometimes cast as a physical segregation problem that which is truly one of economics, presumably in order to sustain preemption.³² Thus, Section 2(b) does not bar preemption in this case under an impossibility analysis that is predicated upon the geographic scope of the PCS licenses the Commission has chosen to award.

³⁰ See California v. FCC, 798 F.2d 1515, 1519-1520 (D.C. Cir. 1986) (Commission's preemption, designed to further competition, of state entry regulation over use of FM subchannels for intrastate common carrier services violative of the Louisiana principles); Nat'l Assn of Regulatory Util. Commissioners v. FCC, 880 F.2d 422 (D.C. Cir. 1989) (FCC's preemption of state regulation over the installation and maintenance of inside wiring to encourage competition remanded because not narrowly tailored; while FCC demonstrated that it should be permitted to require states to unbundle inside wiring from basic transmission services, it did not meet its burden with respect to other state tariff requirements); California v. FCC, 905 F.2d 1217 (9th Cir. 1990) (FCC's preemption of state public utility regulation of enhanced services, state requirements for structural separation of basic and enhanced services, among other things, impermissible as not narrowly tailored (e.g., FCC's preemption encompassed prohibition against structural separation requirements for purely intrastate services)).

³¹ California v. FCC, 39 F.3d 919 (9th Cir. 1994) (On review of remand, FCC's limited preemption of state structural separation requirements for jurisdictionally-mixed enhanced services, and of CPNI and network disclosure rules, upheld because narrowly tailored to impossibility exception); Illinois Bell Tel. Co. v. FCC, 883 F.2d 104 (D.C. Cir. 1989) (FCC's preemption of states' Centrex marketing regulations (including structural separation requirements) upheld because interstate and intrastate components of the FCC's regulation could not be separated).

³² See Public Util. Comm'n of Texas v. FCC, 886 F.2d 1325 (D.C. Cir. 1989) (FCC's preemption of PUC's order which prohibited LEC from providing private microwave owner with additional interconnections to the PSTN upheld as private network incapable of separating interstate and intrastate calls); Pub. Service Comm'n of Maryland v. FCC, 909 F.2d 1510 (D.C. Cir. 1990) (FCC's preemption of states' authority to regulate rates that LECs charge to IXCs to disconnect telephone service for nonpayment of the interstate bill upheld as separation of interstate and intrastate access impossible).

The federal objective to be furthered in this case is the assurance of an efficient, competitive buildout of nationwide wireless communications infrastructure. As explained above, in preempting state rate and entry regulation of CMRS, Congress specifically recognized and accounted for the fact that "mobile services . . . by their nature, operate without regard to state lines."³³

The Commission's adoption of PCS service areas based upon MTAs and BTAs -- geographic areas which follow patterns of trade and do not respect state lines -- demonstrates an express recognition of the interstate character of mobile services. The MTA/BTA service area licensing scheme represents a fundamental departure from telephone number area codes, the cellular MSA/RSA service markets as well as the local access and transport areas ("LATAs") defined within the MFJ. That is, area codes and cellular and LATA service areas were originally designed to respect state lines³⁴ while the MTA/BTA scheme clearly does not.

In adopting the MTA/BTA scheme, the Commission concluded that " . . . a combination of MTA and BTA service areas would promote the rapid deployment and ubiquitous coverage of PCS and a variety of services and providers."³⁵ It did so as a direct result of its experience with cellular systems where the trend toward clustering into regional areas generally occurred. Specifically, the Commission observed that because "there has been a great amount of consolidation of the MSA/RSA markets in the cellular service. . . [resulting] in unproductive regulatory

³³ House Report at 260.

³⁴ See Administration of the North American Number Plan, Notice of Inquiry in CC Docket 92-237, 7 FCC Rcd 6837 (1993) (area codes); United States v. Western Elec. Co., 552 F. Supp. 131, 228-229 (D.D.C. 1982); United States v. Western Elec. Co., 569 F. Supp. 990, 990-995 (D.D.C. 1983) (LATAs).

³⁵ See Personal Communications Services, Second Report and Order in GEN Docket 90-314, 8 FCC Rcd 7700, 7732 (1993) (PCS Second Report); Id. (" . . . large PCS service areas also may facilitate regional and nationwide roaming; allow licensees to tailor their systems to the natural geographic dimensions of PCS markets; [and] reduce the cost of interference coordination between PCS licensees . . . BTAs and MTAs offer large service areas and therefore are complementary with and will facilitate the coordination and negotiation processes associated with the microwave relocation activities that will be necessary in many cases"); Id. at 7733 (" . . . MTAs will result in [the] operation of regional systems that will promote roaming within large geographic areas and may facilitate interoperability with other PCS systems").

and transaction costs in the assignment process for cellular," that "larger PCS service areas, such as MTAs and BTAs, will minimize these problems."³⁶

The larger service areas necessarily will influence system architecture. That in turn will influence the optimal number and location of CMRS to LEC interconnections. It would be impossible to achieve the Congressionally-specified goal of efficient interstate services if systems' architecture and interconnection nodes have to be designed to accommodate varying requirements springing from each state's differing approach to interconnection compensation.

Thus, the adoption of an MTA/BTA licensing scheme establishes a federal design for mobile services consistent with Section 332. Because the Commission is charged with ensuring the continued growth and development of the national wireless infrastructure, the Commission may under Sections 332 and 2(b) preempt any state action inconsistent with a comprehensive federal arrangement.

³⁶ PCS Second Report at 7732. (citation omitted).